Date: December 18, 1997

Case No.: 96-INA-00226

In the Matter of:

AN-POL EXPORT IMPORT,
Employer

On Behalf Of:

TERESA KUC DROZDZIKOWSKA,
Alien

Appearance: Mr. Paul W. Janaszek
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 9, 1994, An-Pol Export Import ("Employer") filed an application for labor certification to enable Teresa Kuc Drozdzikowska ("Alien") to fill the position of Bilingual Secretary (AF 4-5). The job duties for the position are:

> Composes, types, files reports and correspondence. Answers telephone inquiries. Types 60 wpm, steno 100 wpm. Schedules appointments, keeps records of minutes of meetings. Uses wordprocessing computer program (e.g. WordPerfect).

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered. The Employer listed Other Special Requirements as, "[s]peaks, reads and writes in Polish."

The CO issued a Notice of Findings on October 11, 1995 (AF 34-37), proposing to deny certification on the grounds that it is not clear that an identifiable employer exists and if there is no employer, it does not appear that a permanent full-time position for a bilingual secretary exists, in violation of § 656.3. The CO stated:

> Employer is not listed in Business to Business Directory, the Brooklyn Telephone Directory, or with Directory Assistance. Telephone number of form ETA 750A is that of a residence. Address of alien's and employer's residences are the same address identified for employer's business. It does not appear that import and export of computers takes place from a residence.

Additionally, the CO proposed denial of certification because the job opportunity contains a foreign language requirement which has not been supported by evidence of business necessity, in violation of § 656.21(b)(2). The CO stated that the basis for the Polish language requirement appears to be based on the Alien's abilities.

Accordingly, the Employer was notified that it had until November 15, 1995, to rebut the findings or to cure the defects noted.

In his rebuttal, dated November 1, 1995, submitted under cover letter dated November 13, 1995 (AF 38-561), Andrzej Gawlik contended that the Employer, An-Pol Export Import, is a sole proprietorship and he is the only "president/officer" of the company. Mr. Gawlik provided the

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Federal Identification Number for the Employer, and attached documentation to establish "the nature of the company's business, its continuing activity and prosperity i.e. copy of company's Certificate of Corporation, copy of company's Federal Income Tax Return for 1994, copy of lease agreement describing business location, copies of telephone bills, copies of invoices and other documentation pertaining to my company." The Employer stated that he has used the services of a bilingual secretary in the past, but she resigned her position and left the company in November 1994 and he has since used the services of an outside agency, which has proved to be unsatisfactory. The Employer submitted a copy of the secretary's 1099 Form and documentation of his expenses for outside agency services. The Employer contended that:

> . . . the nature of company's business requires to deal with buyers and contractors in Poland and in the United States. Unfortunately, the company's business counterparts are by about 70% not conversant in English. The total number of the customers we serve is approximately 500 a week. 70% of our customers are of Polish nationality and not conversant in English language. Consequently about 70% of our business is dependent on Polish language. . . .

In support of its rebuttal regarding the foreign language requirement, the Employer submitted copies of the company's invoices, phone bills, and telephone book messages.

The CO issued the Final Determination on January 11, 1996 (AF 562-565), denying certification because: (1) documentation submitted does not clearly establish that an identifiable employer exists who can offer permanent full-time work to a bilingual secretary; and, (2) documentation and testimony with regard to foreign language as essential business necessity remains inconclusive. Accordingly, the CO determined that the Employer remains in violation of §§ 656.3 and 656.21(b)(2).

On January 22, 1996, submitted under cover letter dated February 8, 1996, the Employer requested review of the Denial of Labor Certification (AF 566-582). On March 11, 1996, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Brief on May 1, 1996.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc)* is applicable. See also, *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc)*. The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

In the instant case, the Employer is requiring that applicants be able to speak, write, and read in Polish (AF 5). As such, the CO, in the NOF, informed the Employer that it must establish the business necessity of the requirement pursuant to § 656.21(b)(2). Specifically, the CO instructed the Employer to document the following:

1. The total number of clients/people he deals with and the percentage of those people he deals with who cannot communicate in English. Document how these clients/people communicate in New York and in an international business environment when Polish is not spoken/understood.
2. The percentage of his business that is dependent upon the language. Document the basis for the percentage.
3. How absence of the language would adversely impact business. Be specific.
4. The percentage of time worker would use the language. Relate percentage to the duties described on form ETA 750A, item #13.
5. Describe how employer has dealt with and handled Polish speaking clients previously or is currently handling this segment of his business. Document paid invoices for services of outside agency referred to in Employer's letter of December 23. Document language abilities of other workers; their job titles and duties. Document language abilities of officers and managers; identify their titles.
6. Any other documentation which will clearly show that fluency in Polish is essential to employer's business.

The Employer submitted approximately 500 pages of rebuttal evidence (AF 43-561). In summary, the Employer's documentation includes invoices, written in English, indicating items that the Employer purchased from other U.S. companies (AF 425-475, 505-521, 523-26); invoices, also written in English, indicating sales from the Employer to individuals in Poland (AF 223-266, 355-361, 477-506); bank statements (AF 466-476, 374-424); phone bills indicating calls to Poland (AF 265-347); correspondence written in Polish and addressed to Polish addresses (AF 144-186); evidence that the Employer previously employed a bilingual secretary; and, phone messages, some of which are written in Polish (AF 43-129).[2] In addition to this documentation, the Employer stated that his business is a sole proprietorship and he is the only "president/officer of the company" (AF 560). The Employer explained that his previous bilingual secretary resigned and he has been using an outside agency for these services (AF 559). In addition, the Employer stated that Western countries are often isolated because of the language barrier and, therefore,

[2]Several documents included in the Employer's rebuttal are unreadable or are only written in Polish (AF 348-351, 353-354, 364-373).

companies are left with no alternative but to hire a bilingual secretary who can handle telephone calls, business correspondence, and in-person inquiries in Polish and English languages. The Employer asserted that it serves approximately 500 customers per week and "about 70%" of its business counterparts cannot speak English (AF 558). Accordingly, the Employer stated that 70% of its business is dependent on the Polish language and 70% of data information is gathered through faxes, business correspondence, and conversation with Polish-speaking counterparts. The Employer also stated that,

> [t]o enhance the company's business, it is necessary that the company has bilingual secretary in its employment as soon as possible. The absence of a bilingual secretary would cause loss of customers, clients, buyers, suppliers, and would result in decrease of company's revenue, and in decrease of Eastern European share at the U.S. market, which has already proved to contribute to the U.S. economy. The interest of customers, contractors, buyers, suppliers or sellers in dealing with this company calls for immediate response to their telephone, in person, or in writing inquiries.

(AF 557). Finally, the Employer explained that the Company works in an extremely competitive environment and, therefore, it needs a secretary who is able to schedule appointments and promptly respond in writing or by telephone to all business correspondence.

In the Final Determination, the CO continued to find that the Employer failed to rebut its finding that the foreign language requirement is unduly restrictive (AF 562-565). We agree with the CO and find his reasoning accurate. As discussed above, *Information Industries* requires the Employer to show that a "significant" portion of its clients speak Polish. The Board has not quantified what "significant" portion of foreign-speaking clients justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics*, 88-INA-416 (July 30, 1990) (*en banc)*; *Chris and Cary Enterprises*, 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak Sakai*, 90-INA-330 (Oct. 30, 1991)). The Board has also held that where the employer is credible and offers evidence that at least a significant portion of its clients are foreign speaking, it need not document that they comprise a particular percentage. *Raul Garcia, M.D., supra*.

As outlined above, the Employer in this case submitted a voluminous amount of rebuttal documentation in an effort to show that a significant portion of its business is conducted in Polish (AF 43-561). We emphasize that the Employer has the burden of establishing that a significant portion of its business, whether it be 35% or 90%, is, in fact, conducted in Polish. Although we do not doubt that the Employer in this case has Polish-speaking clients, we find that the Employer has not provided sufficient evidence to show that these clients constitute a "significant" portion of his business.

As the CO correctly pointed out, the Employer's telephone bills do not provide evidence that the conversations were actually conducted in Polish. Furthermore, we note that the Employer's office is located at his residence; therefore, we cannot be sure that these calls were even for business purposes. Likewise, a majority of the invoices and sales receipts provided by the Employer are written in English, thus leading us to believe that these companies are at least

capable of understanding some English. We further find that the Employer's bank statements are not relevant in determining whether a significant portion of his business is conducted in Polish.

Even assuming that the Employer could show that a significant portion of his business is conducted in Polish, we find that the Employer has failed to show that the use of Polish is essential for the reasonable performance of the job duties, as required by the second prong of the standard set forth in *Information Industries, supra.* The Board has held that an employer's clients' preference to do business in a foreign language supports a finding of business necessity where the employer has established that it would lose a significant portion of its business. See *Mr. Isak Sakai, supra; Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Jung Gil Choi, C.P.A.*, 88-INA-254 (Mar. 27, 1990). The Employer in this case argued that the absence of a bilingual secretary would cause loss of customers, clients, buyers, and suppliers. Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. As such, the Employer has failed to satisfy the second prong of the standard set forth in *Information Industries, supra.* Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.